FILED
APR 25 1997
OFFICE OF THE CLERK

(2)

No. 96-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Petitioners,

v.

OXY USA INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

W. DEVIER PIERSON*
MARK E. GREENWOLD
PIERSON SEMMES AND BEMIS
1054 31st Street, N.W.
Washington, D.C. 20007
(202) 333-4000

THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN
& CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Respondent
**Counsel of Record*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

TABLE OF CONTENTS

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES iii

ARGUMENT 4

I. The Tenth Circuit's Decision Applying *BMW* Does Not Conflict with *Gasperini* 4

II. The Tenth Circuit Properly Conducted the *BMW* Analysis 8

A. Constitutional Review of Punitive Damage Awards May Encompass Factors Not Considered By the Jury 8

B. The Tenth Circuit Did Not Establish Or Apply a Mandatory Ceiling on the Ratio of Punitive Damages to Actual and Potential Harm, But Engaged in Precisely the Case-Specific Review *BMW* Commands 11

CONCLUSION 14

RULE 29.6 DISCLOSURE

The parent companies of OXY USA Inc. are Occidental Oil and Gas Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. OXY USA Inc. owns minority interests in Canadian Occidental Petroleum, Ltd., Occidental Chemical Investment (Canada) 1, and East Texas Salt Water Disposal Company. All other companies in which OXY USA Inc. owns an interest are wholly-owned subsidiaries.

TABLE OF AUTHORITIES

CASES

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) ..... passim

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 8

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 3

Consorti v. Armstrong World Indus., Inc., 103 F.3d 2 (2d Cir. 1995) 6,7

Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) 7

Creative Demos, Inc. v. Wal-Mart Stores, Inc., ____ F. Supp. ____, No. 91-1256C, 1997 WL 74203 (S.D. Ind. Feb. 7, 1997) 2

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 7

Florez v. Delbovo, 939 F. Supp. 1341 (N.D. Ill. 1996) 2

Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996) ..... passim

Geuss v. Pfizer, Inc., No. 94-7059, 1996 WL 729048 (E.D. Pa. Dec. 17, 1996) 2

Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) 5,8

Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403 (S.D.N.Y. 1996) 2

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) 6

Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996) 6

Mejias-Quiros v. Maxxam Property Corp., ___ F.3d ___, No. 96-1691, 1997 WL 104057 (1st Cir. March 13, 1997) 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6

OXY USA, Inc. v. Continental Trend Resources, Inc., 116 S. Ct. 1843 (1996) 1

Outboard Marine Corp. v. Babcock Indus., Inc., 106 F.3d 182 (7th Cir. 1997) 6,7

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 5,8

Rush v. Scott Specialty Gases, Inc., 930 F. Supp. 194 (E.D. Pa. 1996) 2

Schimizzi v. Illinois Farmers Ins. Co., 928 F. Supp. 760 (N.D. Ind. 1996) 2

Solorio v. United States, 483 U.S. 435 (1987) 7

Steinke v. Beach Bungee, Inc., 105 F.3d 192 (4th Cir. 1997) 6,7

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), ... 5

Utah Foam Prods. Co. v. Upjohn Co., 930 F. Supp. 513 (D. Utah 1996) 2

STATUTE

42 U.S.C. § 1983 7

RESPONDENT'S BRIEF IN OPPOSITION

On May 8, 1995, OXY USA, Inc. ("OXY"), respondent in the present case, petitioned this Court in *OXY USA, Inc. v. Continental Trend Resources, Inc.*, No. 94-1838, to review the 1995 decision of the United States Court of Appeals for the Tenth Circuit affirming a $30,000,000 punitive damage award in favor of the present petitioners, Continental Trend Resources, Inc., et al. ("CTR"). On May 28, 1996, this Court granted the petition, vacated the judgment below, and remanded to the Tenth Circuit for reconsideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). *OXY USA, Inc. v. Continental Trend Resources, Inc.*, 116 S. Ct. 1843 (1996); Appendix to Petition for Writ of Certiorari ("Pet. App.") at 30a. On remand, the Tenth Circuit applied the analysis this Court enunciated in *BMW*, as this Court directed it to do, and concluded that the $30,000,000 punitive damage award, which was imposed to punish conduct that allegedly caused $269,000 in purely economic injury arising from a business dispute, was unconstitutionally excessive. The court remitted the award to $6,000,000, and gave CTR the option of a new trial in the event it rejected the remittitur.

While CTR and OXY can and do disagree as to whether the Tenth Circuit's remittitur is too large, or not large enough, that court's straightforward application of the *BMW* analysis to the unique set of facts before it presents no question for this Court's review. It is no different in that regard than the numerous other fact-specific decisions of other federal courts remitting punitive damage awards in

light of *BMW*.[1] This Court does not review such fact-bound applications of established law.

CTR's attempt to create a conflict between the Tenth Circuit's decision on remand and this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996), overlooks a critical distinction. The two decisions address entirely different issues. *Gasperini* involved federal appellate review of decisions concerning the excessiveness of *compensatory* damage awards as a matter of *state* law. That decision does not address, much less answer, the question in this case of federal *constitutional* review of *punitive* damage awards. The Tenth Circuit's appellate review of the punitive damage award in this case is consistent with every punitive damage decision by this Court. Indeed, any other mode of review would not have

---

[1] *See, e.g., Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, ____ F. Supp. ____, No. 91-1256C, 1997 WL 74203, at *8-11 (S.D. Ind. Feb. 7, 1997) (ordering new trial on punitive damages because $6,500,000 award was grossly excessive under *BMW* analysis); *Geuss v. Pfizer, Inc.*, No. 94-7059, 1996 WL 729048, at *9-12 (E.D. Pa. Dec. 17, 1996) ($150,000 award remitted to $17,500); *Florez v. Delbovo*, 939 F. Supp. 1341, 1349 (N.D. Ill. 1996) ($750,000 punitive award remitted to $275,000); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 414-15 (S.D.N.Y. 1996) ($250,000 award remitted to $50,000); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 532 (D. Utah 1996) ($5 500,000 award remitted to $607,146); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201-02 (E.D. Pa. 1996) ($3,000,000 award remitted to $300,000); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) ($600,000 award remitted to $135,000).

conformed to this Court's order to reconsider the case in light of *BMW*.

CTR offers several theories in support of its contention that the Tenth Circuit did not properly conduct the *BMW* analysis. None have merit. But even if they did, CTR has failed to demonstrate that any alleged error conflicts with the decisions of other courts of appeals or presents questions of particular importance. For example, CTR argues that the Tenth Circuit established a ceiling of a 10 to 1 ratio of punitive damages to actual and potential harm in commercial cases, and that this purported ruling violates due process. This argument misrepresents the Tenth Circuit's decision, which does *not* establish a fixed ratio for application in all commercial cases. Rather, the Tenth Circuit determined, based on the facts before it, that $6,000,000 is the maximum constitutionally permissible punitive damage award, taking into account the numerous factors this Court set forth in *BMW*. There is nothing certworthy about such a determination.

In essence, CTR asks this Court to review the decision of the Tenth Circuit because CTR asserts that the conditional remittitur of the punitive damage award to $6,000,000 is, itself, somehow unconstitutional. That is a very bold request, given that even the remitted punitive damage award is the largest such award ever affirmed by any federal or state court under Oklahoma law, and is still 22 times the compensatory damage award. Punitive damages are, of course, "a windfall to a fully compensated plaintiff." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Petitioners' attempt to maximize the punitive award in this case presents no issue for this Court's review.

ARGUMENT

I. The Tenth Circuit's Decision Applying *BMW* Does Not Conflict With *Gasperini*

CTR argues that the Tenth Circuit contravened *Gasperini* by failing to show appropriate deference to the jury's $30,000,000 punitive damage award. *Gasperini*, however, is irrelevant to the question that was before the Tenth Circuit. *Gasperini* addressed a Seventh Amendment challenge to federal appellate court review of district court decisions regarding state law excessiveness of compensatory damage awards. The Court held that such review does *not* violate the Seventh Amendment, and established that abuse of discretion is the appropriate standard of review in such cases. 116 S. Ct. at 2224-25. The excessiveness question in *Gasperini*-type cases is whether the compensatory award comports with the evidence of harm to the plaintiff presented to the jury, that is, whether the jury correctly calculated actual damages.

The present case, and *BMW*, by sharp contrast, involve constitutional review of punitive damage awards. The excessiveness question in these cases is whether the punitive damage award comports with constitutional requirements of fair notice and a rational relationship to the state's legitimate interests in punishment and deterrence. *See BMW*, 116 S. Ct. at 1595 (punitive award "grossly excessive" in relation to state's legitimate interests in punishment and deterrence "enter[s] the zone of arbitrariness that violates the Due Process Clause"). As the Tenth Circuit explained, this inquiry requires a legal determination; the jury was never asked to resolve this constitutional question and so there can be no issue of reexamining the jury's factfinding under the Seventh Amendment. Pet. App. at 20a ("In the case before us . . . we would not be redetermining a fact issue found by a jury. We ascertain no error . . . in the jury's fact-finding. Rather we have concluded, aided by the intervening *BMW*

case, that the jury's punitive damages award was so excessive it violated the substantive element of the Due Process Clause of the Federal Constitution. This is a federal constitutional issue.").

CTR argues that the determination of a punitive damages award is a question of "fact" for the jury. Pet. at 12-13. Even assuming *arguendo* that the *jury's* assessment of punitive damages under state law is a question of "fact," however, appellate review to determine whether the amount of punitive damages violates the federal Constitution involves an altogether different process. The jury's finding of "fact" may be in accord with state law standards, but, as *BMW* demonstrates, the reviewing court must still determine whether the result is constitutional. There is no reexamination of fact found by a jury in that determination.

This Court repeatedly has emphasized the constitutional requirement of searching appellate review in punitive damage cases. Because "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co. v. Oberg,* 114 S. Ct. 2331, 2340 (1994), procedural due process requires especially rigorous appellate scrutiny of punitive damage awards to protect against arbitrary and extreme punishments. Thus, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the Court upheld the Alabama punitive damage system in large part because it perceived that system to mandate independent, objective appellate review of punitive damage awards pursuant to "detailed substantive standards." *Id.* at 20-21. In *Honda,* the Court held that due process mandates post-verdict judicial review, explaining that both *Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), emphasized "the procedural component of the Due Process Clause," particularly stressing meaningful appellate review as a procedural protection. 114 S. Ct. at 2335. And, in *BMW,* the Court not only announced new federal standards to

determine whether a punitive damage award violates the Constitution, it applied those standards itself to strike down the award as excessive, without deferring to the Alabama courts' and jury's findings. If CTR were correct that searching appellate constitutional review of punitive damages violates the Seventh Amendment, this Court would have been guilty of such a violation in *BMW* itself, handed down only one month before *Gasperini*.[2] That proposition is obviously wrong. The Tenth Circuit's application of *BMW* to this case certainly produced no constitutional violation and presents no issue worthy of this Court's review.[3]

---

[2] The Seventh Amendment applies when this Court reviews the verdict of a state jury. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964).

[3] CTR alleges a split of authority among the federal courts of appeals on the proper application of *Gasperini*, Pet. at 10-11, but this case does not implicate any such disagreement. This case involves constitutional review, to which *Gasperini* does not speak. None of the cases comprising CTR's purported split involved constitutional determinations. *See Steinke v. Beach Bungee, Inc.*, 105 F.3d 192 (4th Cir. 1997) (state law excessiveness of compensatory award); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182 (7th Cir. 1997) (state law additur of compensatory award); *Consorti v. Armstrong World Indus., Inc.*, 103 F.3d 2 (2d Cir. 1995) (state law excessiveness of compensatory award); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (state law excessiveness of punitive damage award); *Mejias-Quiros v. Maxxam Property Corp.*, ___ F.3d ___, No. 96-1691, 1997 WL 104057 (1st Cir. March 13, 1997) (same); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (excessiveness of punitive damage award under federal common law).

[Footnote continued on next page]

Moreover, appellate scrutiny of this punitive damage award did not infringe the relationship between the trial court and the court of appeals, and did not require the Tenth Circuit to remand the case to the trial court before it could determine the constitutional question of excessiveness.[4] The determination that a punitive damage award is

---

[Footnote continued from previous page]
Moreover, all the cases CTR cites in which courts have applied *Gasperini* have involved compensatory damages under state law. *See Steinke*; *Outboard Marine*; *Consorti*. No appellate court has applied *Gasperini* to limit its authority to review a punitive damage award, much less to do so when the issue involves a federal constitutional determination.

The present Tenth Circuit decision is the only reported post-*Gasperini* case in which a court of appeal has explicitly ruled on the constitutional excessiveness of a jury verdict for punitive damages. *Cf. Cooper v. Casey*, 97 F.3d 914, 919-20 (7th Cir. 1996) (rejecting excessiveness challenge to punitive damage award under 42 U.S.C. § 1983 without stating whether court was conducting constitutional or federal common law review; no reference to standard of review or Seventh Amendment). By definition, there is no split of authority.

[4] When this case was before the Tenth Circuit on remand, CTR did not take the position that the court of appeals should send the case back to the trial court, but rather urged the Tenth Circuit to address the issue of excessiveness on the merits. CTR therefore has waived any argument about the necessity of remand to the trial court. *See Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

unconstitutionally excessive involves the application of a constitutional standard, an exercise fully within the capacity of the courts of appeals. CTR argues, Pet. at 9-10, that *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), limits the court of appeals to abuse of discretion review of the district court's decision, but this argument is plainly wrong. The discussion in *Browning-Ferris* related solely to procedures for review of punitive damage awards under state law. *Id.* at 277-80. The Court in that case explicitly declined to make any decision regarding the nature and scope of constitutional review for excessiveness under the Due Process Clause. *Id.* at 276-77, 279-82. The Court defined the scope of constitutional review in later cases such as *BMW, Haslip,* and *Honda,* which do not limit the constitutional excessiveness determination to abuse of discretion review.

II. The Tenth Circuit Properly Conducted the *BMW* Analysis

A. Constitutional Review of Punitive Damage Awards May Encompass Factors Not Considered By the Jury

CTR argues that the Tenth Circuit violated the Seventh Amendment in conducting its constitutional review by considering two affidavits that CTR had placed in the appellate record but that CTR had not submitted to the jury.[5]

---

[5] CTR neglects to mention that the affidavits in question were by CTR's own experts, submitted to the trial court by CTR in connection with a summary judgment motion, cited by CTR in its briefs to the Tenth Circuit, and included by CTR in the appellate record. CTR's complaint that it did not

[Footnote continued on next page]

CTR again confuses the nature of the Tenth Circuit's exercise. The Tenth Circuit, pursuant to a direct mandate from this Court, determined on remand whether the State of Oklahoma constitutionally could impose this extraordinary level of punishment on OXY. The Tenth Circuit did not attempt to assess whether the jury properly considered the evidence before it. *See* Pet. App. at 20a ("We ascertain no error . . . in the jury's fact-finding."). The exercise of constitutional review is of broader scope, encompassing those factors relevant to the state's legitimate interests in punishment and deterrence and to due process considerations of fair notice. *See BMW*, 116 S. Ct. at 1595, 1598. Thus, this Court in *BMW* established as an essential guidepost of such review the consideration of civil and criminal penalties that could be imposed for similar misconduct—facts plainly outside the consideration of the jury. *Id.* at 1603.

BMW also indicated that a reviewing court sometimes should consider the potential injury to the plaintiff in determining whether a punitive damage award violates due process. *Id.* at 1602. The two affidavits at issue in this case go to this question. CTR contends that the Tenth Circuit's reliance on these two affidavits invaded the province of the jury, but the jury in this case made absolutely no determination regarding potential harm; there was no jury instruction on the issue. Indeed, since CTR did not seek instructions or a special verdict on the potential harm issue, the Tenth Circuit, by relying on these affidavits, was giving

---

[Footnote continued from previous page]
have the opportunity to "cross-examine" its own affiants, Pet. at 23, is at best disingenuous.

CTR the benefit of the doubt.[6] An appellate court's attempt to assess as accurately as possible an element of constitutional review does not reexamine a fact found by the jury when the jury was never asked to make such a finding.

Even if the Tenth Circuit did somehow err in considering the two affidavits at issue here, it is a case-specific error not appropriate for this Court's consideration. The Tenth Circuit announced no rule of law in this regard, and CTR has cited no case from another court of appeals that is contrary to the Tenth Circuit's decision here. Indeed, CTR cites no authority from any court establishing that the Seventh Amendment precludes a court conducting constitutional review from considering matters placed in the record by the complaining party but not presented to the jury. CTR disagrees with the Tenth Circuit's conclusion regarding potential harm;[7] this is not a matter for this Court's attention.

---

[6] The only damages actually found by the jury were $269,000 in compensatory damages. The Tenth Circuit's use of these affidavits, in addition to other evidence that CTR does not challenge, resulted in a generous estimate of potential harm that substantially increased that court's determination of the maximum constitutionally allowable punishment. CTR's complaint is that the court did not interpret other alleged evidence to increase its estimate of potential damages even more. Such a claim, arising out of a dispute over the interpretation of specific evidence in a 10,000-page appellate record, hardly presents certworthy issues.

[7] CTR contends that the Tenth Circuit's present conclusion concerning potential harm conflicts with its earlier purported determination that OXY's conduct created $5,000,000 in

[Footnote continued on next page]

B. The Tenth Circuit Did Not Establish Or Apply a Mandatory Ceiling on the Ratio of Punitive Damages to Actual and Potential Harm, But Engaged in Precisely the Case-Specific Review *BMW* Commands

CTR makes two contradictory arguments regarding the Tenth Circuit's discussion of the ratio of punitive damages to actual and potential harm. CTR argues first that the Tenth Circuit erred in *not applying* a supposed 10 to 1 maximum ratio, Pet. at 23-25, and then contends that the court erred in *establishing* a 10 to 1 ratio as a "bright line" test. *Id.* at 25-27. Both of these arguments are wrong, and neither provides a reason for granting certiorari.

If 10 to 1 were truly a "bright line," the Tenth Circuit presumably would have applied that rule on remand, and been done with the matter. But that is not what the Tenth Circuit did. Instead, the Tenth Circuit followed all aspects of this Court's analysis in *BMW*. The *BMW* Court explained that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential

---

[Footnote continued from previous page]
potential harm. Pet. at 18. Setting aside that the Tenth Circuit's alleged inconsistency is irrelevant to the question whether this Court should grant review, CTR's argument is based on the misrepresentation of a single footnote in the prior opinion. *See* Pet. App. at 46a-47a, n.15. The statement in the Tenth Circuit's prior opinion that CTR relies upon was *not* a finding of that court, but rather a characterization of the trial court's finding regarding profit incentive, which the Tenth Circuit unanimously found to be "incorrect or misapplied." *Id.* at 46a.

damages to the punitive award." 116 S. Ct. at 1602. The ratio is simply one of several elements the reviewing court should consider. The Tenth Circuit, contrary to CTR's argument, considered numerous factors, including whether OXY had fair notice of the size of this punitive award and the nature of the conduct for which it could be punished, Pet. App. at 8a-9a, the nature of OXY's alleged misconduct and the purely economic nature of the alleged injury, *id.* at 9a-12a,[8] the ratio of punitive damages to actual and potential harm and to OXY's actual and potential profit, *id.* at 13a-15a, civil and criminal penalties for similar misconduct, *id.* at 15a-16a, and OXY's financial status (a factor not mentioned in *BMW*, and one that increased the level of the punitive award here). *Id.* at 17a-18a.[9] Upon review of all these

---

[8] In *BMW*, the Court cited the distinction between economic injury and harm to health and safety as a relevant factor in evaluating the reprehensibility of punishable conduct. 116 S. Ct. at 1599. The Tenth Circuit, which had rejected this distinction when OXY urged it in its initial appeal, Pet. App. at 50a, recognized its significance in the decision on remand. *Id.* at 10a.

[9] CTR argues that the Tenth Circuit "refused to consider OXY's expected gain" in reviewing the punitive damage award. Pet. at 27. This is incorrect. The Tenth Circuit concluded expressly that "the total *actual and potential profit* had OXY succeeded would be near $2,000,000." Pet. App. at 14a-15a (emphasis added). The court then used this figure in noting that the remitted $6,000,000 punitive award was "about three times our calculation of actual and potential damages." *Id.* at 21a.

[Footnote continued on next page]

factors, the Tenth Circuit concluded that "$30,000,000 exceeds the constitutional limit." *Id.* at 19a. Acknowledging that determination of the allowable amount of punitive damages is a "difficult decision," the court nonetheless used its "best judgment [to] determine that $6,000,000 is the maximum constitutionally permissible punitive damages award justified by the facts of this case." *Id.* at 21a. The Tenth Circuit then explained that the approved award was between three and six times CTR's actual and potential damages—ratios that it found to be within constitutional acceptability under these particular facts. *Id.* The Tenth Circuit engaged in a fact-specific application of the entire *BMW* analysis; it did not establish or apply any "bright line" ratio.

Indeed, while CTR incorrectly accuses the Tenth Circuit of relying "solely" on the ratio guidepost, Pet. at 5, 23, CTR actually wants to elevate the ratio above all other considerations. CTR argues that the Tenth Circuit was somehow compelled to affirm a punitive award of at least ten times the actual and potential damages in this case, regardless of the other *BMW* factors. *See* Pet. at 23-25. The rule CTR asserts here would contravene *BMW*'s admonition against overreliance on a mathematical formula.

CTR's argument that the Tenth Circuit established a 10 to 1 ceiling contradicts the plain language of the Tenth

---

[Footnote continued from previous page]

CTR contends also that the Tenth Circuit was required to consider the potential harm to others. The *BMW* decision does not support this conclusion, as the Tenth Circuit explained. Pet. App. at 13a. Moreover, CTR fails to cite a case from any other court of appeals that conflicts with the Tenth Circuit's reading of *BMW*.

Circuit's decision. The court explicitly recognized that the *BMW* "guidelines . . . contain no absolutes." Pet. App. at 21a. Based upon this Court's discussion of ratio in *BMW* and *TXO*, the Tenth Circuit "*surmise[d]*" that "in *economic injury* cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm *generally* cannot exceed a ten to one ratio." Pet. App. at 13a (emphasis added). This is hardly a "bright line" test. The Tenth Circuit simply determined that "in this [economic injury] case," the ratio of the $30,000,000 punitive award to the actual and potential harm to CTR was too large. *Id.* at 19a. That determination contravenes no decision of this Court or of any other court of appeals, and is not appropriate for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

April 25, 1997

Respectfully submitted,

W. DEVIER PIERSON*
MARK E. GREENWOLD
PIERSON SEMMES AND BEMIS
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-4000

THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN
& CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Respondent
**Counsel of Record*